INTERNATIONAL LAW AND THE DRAGO DOCTRINE.

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ON July 21st, the representatives of twenty-one American States convened at Rio de Janeiro for the third session of the International Conference of American States.

The last Conference was held in Mexico City, and lasted from October 22nd, 1901, to January 22nd, 1902—just three months. At that Conference, three important agreements were formulated relative to arbitration and the peaceful settlement of international disputes: First, a protocol to adhere to the Hague Convention of 1899 (it will be remembered that Mexico and the United States were the only American states invited to the Hague Conference); second, a treaty of compulsory arbitration, which was signed by ten delegations and has since been ratified by six of the Republics; third, a treaty for the arbitration of "all claims for pecuniary loss or damage," which was afterwards ratified by six of the states, including the United States. This treaty was to be operative for five years from the date it should be ratified by five of the American states. It went into force March 24th, 1905.

At the recent Conference at Rio de Janeiro, only one new question relative to the modes for settling international disputes was scheduled for discussion. It read:

"A resolution recommending that the second Peace Conference at The Hague be requested to consider whether and, if at all, to what extent the use of force for the collection of public debts is admissible."

This question may be said to have had its origin in the war which Great Britain, Germany and Italy made against Venezuela, in 1902, to force the acknowledgement and payment of the pecuniary claims which their respective subjects held against Venezuela.

At that time, Dr. Luis Drago, Minister of Foreign Relations of the Argentine Republic, addressed a communication to the United States relative to the forcible collection by a foreign state of the public debt owned by its subjects. Dr. Drago seems to have expressed no doubts about the legal right of creditor states to force the payment of those pecuniary claims which have their origin in the ownership of the bonds of a debtor state. He merely sought to have the United States adopt, as supplementary to its Monroe Doctrine policy, a further policy to the effect "that the public debt [of an American state] cannot occasion armed intervention, nor in any wise the actual occupation of the territory of American nations, by an European power."

Dr. Drago called attention to the fact that "the collection of loans by force implies territorial occupation to make it effective; that territorial occupation means the suppression of the Governments of the countries on which it is imposed"; that there was considerable European expression in favor of establishing colonies in South America; and that, he feared, under the guise of "financial interventions," the yearnings, evidenced by that expression, might be suddenly stimulated and gratified.

Without commenting on the grounds, or lack of grounds, for such anxiety or on the wisdom of the proposal, attention is called to the difference between the proposition originally urged by Dr. Drago and the question formulated for discussion at Rio de Janeiro. Señor Drago proposed a question of policy for the Pan-American states.* The resolution under consideration at Rio de Janeiro involved the submission to the next Hague Conference of a question of law, to which, it is respectfully submitted, there can be but one answer.

Law and Practice.—When it is recollected that states are in legal theory equally independent; that the rules which regulate their relations are supposed to afford to one the same general rights and obligations that are afforded to another; that these rules have, as yet, developed no formal, superior judicial or administrative authority; that, in consequence, to every state is

* The Calvo Doctrine has to do with the principle of law, observed between the first-class Powers, which requires subjects to exhaust the judicial remedies of the debtor-state before their state interposes to present their claims diplomatically. It was urged by Señor Calvo, for many years the distinguished Minister of the Argentine Republic at Paris, that this rule should be observed by the first-class Powers in their transactions with the Latin-American states.

accorded the right to determine for itself when its rights have been invaded; that every state which considers itself aggrieved enjoys the sole right to decide the redress which it shall exact, and whether in the given case it has exhausted all the peaceful remedies to secure redress; that the use of force or war is a recognized legal remedy by which states may settle their differences; that every state is, in legal theory, accorded complete sovereignty over the persons and properties within its jurisdiction; that, as a consequence of this, every injury to the person and property of foreign subjects within its jurisdiction may be legally ascribed to the act of the state itself; that an injury to the subject of a state is to that extent, in law, an injury to the particular state; that states, like individuals, are entitled to maintain a reputable existence, and to protect themselves from debilitation and destruction; that their dignity and reputation, their economic and social welfare, are so intimately bound up in the maintenance of the persons and property of their subjects that they are compelled to guard jealously every invasion of their international rights—when these facts are recollected, it would seem that the answer to the question, "whether and, if at all, to what extent the use of force for the collection of public debts is admissible," must be that, as a matter of legal right, each state determines for itself both the conditions under which it is justified in using force, and the extent to which it shall go in the use of force, to collect the public debts due its subjects by another state.

States have, from time to time, and generally, declined, for reasons of domestic expediency, to exercise their legal right to collect the public bonds of foreign states due their subjects, but they have never admitted that they did not have the right to do so.

It is the general practice of states in these matters to afford to their subjects only their unofficial good offices. They have desisted from giving further help: sometimes to encourage their subjects to invest their capital at home or in the colonies, sometimes because it was considered incompatible with the dignity of the state to allow itself to become a debt-collection agency for unprincipled speculators, sometimes for fear their motives might be misunderstood by sister states, and unforeseen international complications thereby raised.

But, as pointed out in the oft-cited circular of Lord Palmerston in 1848 to the British representatives in foreign states, "it might

happen that the loss occasioned to British subjects by the non-payment of interest upon loans made by them to foreign Governments might become so great that it would be too high a price for the nation to pay . . . . and in such a state of things it might become the duty of the British Government to make these matters the subject of diplomatic negotiations."

The year before, in 1847, Lord Palmerston had taken occasion in Parliament to indicate the right of the British Government to make war against Spain for the recovery of the public debts due British subjects; and, in connection therewith, he stated: "This is a question of expediency, and not a question of power; therefore, let no foreign country which has done wrong to British subjects deceive itself by a false impression either that the British nation or the British Parliament will forever remain patient under the wrong."

In declining, in December, 1861, to participate in the concerted action of Great Britain, France and Spain to force Mexico to settle the claims, including public debts, due their respective subjects, Mr. Seward, as Secretary of State, said: "The President does not feel himself at liberty to question, and he does not question, that the sovereigns represented have undoubted right to decide for themselves the fact whether they have sustained grievances, and to resort to war with Mexico for the redress thereof, and have a right, also, to levy the war severally or jointly."

Further, it should be noted that the International Arbitration Tribunals, which have held that they had no jurisdiction to receive and decide bond claims "in the absence of express language to that effect" in the treaty establishing the Tribunal, have expressed no doubt whatever as to the legal right of a state to press such claims for payment by any means which its own domestic and foreign policy might dictate. Such, for example, was the opinion of Sir Frederick Bruce, who acted as umpire in the arbitral settlement between the United States and Colombia under the Convention of February 10th, 1864.

It can probably be stated without fear of contradiction that no state has ever resorted to force to collect from another state the public debt due to its subjects, where the acknowledgement and payment of the debt was the sole subject of difference between them. Nations are not likely to make war for such a cause alone. One day's war would cost more than the whole debt due.

Perhaps the instances in which the deferred payment of the public debt has been most nearly the sole cause for resorting to force, are the intervention of 1861 by France, Great Britain and Spain in Mexico, and the intervention of 1902 by Germany, Great Britain and Italy in Venezuela. In both instances, the subjects of the intervening Powers had suffered, at the hands of the delinquent states, repeated and serious injuries through violence and the denial of civilized justice. In both cases, it has been alleged that the ostensible reasons for intervening were not the real ones. However that may be, for the motives of states as of individuals are not accurately comprehended, it can be safely asserted that, as a general rule, creditor states have shown a considerate disposition toward debtor states, and this from the purely selfish reasons to which attention has already been called.

Where the finances of states have become utterly deranged from various causes—such as the ravages of civil and foreign war, a corrupt, extravagant and overmanned financial service, conducted without proper means of accounting—it has frequently happened that the creditor states have been able, through diplomatic negotiation and pressure, to take over temporarily the administration of the finances of the country. This is what happened in Egypt in 1879, in Greece in 1898, and in San Domingo in 1904.

In some instances claims, arising from non-payment of bonds, without having been the subject of prior diplomatic negotiation, have been presented by the counsel of a creditor state to an International Arbitration Tribunal established by treaty to hear and decide "all claims" against either state. With one exception, the Tribunals have declined to take jurisdiction on the ground that the claims had not been diplomatically presented and could not, therefore, have been intended by the High Contracting Parties to be embraced within the description "all claims." And, though it seemed to be admitted that this objection would not be applicable to other than bond claims, yet it was applicable to them merely because of the special policy of non-interposition which states ordinarily pursued in these cases.

Effect of Arbitration Treaties.—It has been thought by some that the establishment of The Hague Arbitration Tribunal affected to some extent the rules of international law, by making it incumbent upon states to arbitrate their differences and not to resort to the use of force. This is a mistake. The obligation, or

rather the lack of obligation, to arbitrate remains the same, except possibly that there is an indefinite moral obligation imposed by the civilized public opinion of the world. And even international law is made up of more determinate stuff than this!

On the belief that The Hague Arbitration Convention of 1899 had "altered international law," it was urged by the counsel for Venezuela, Mr. Wayne Mac Veagh, in the Preferential Treatment case at The Hague, that "the question as to whether or not Great Britain, Germany and Italy are entitled to preferential or separate treatment in the payment of their claims against Venezuela" required the Tribunal to decide "whether the war [waged] was justified or not," and that this was "the whole marrow of the question" submitted for decision.

The Tribunal, however, held that it "was not called upon to decide whether the three blockading Powers had exhausted all pacific methods in their dispute with Venezuela, in order to prevent the employment of force"; in fact, it considered itself "absolutely incompetent to give a decision as to the character or nature of the military operations."

Some have been misled as to the significance of The Hague Convention in international law by the language of Article XIX of that Convention, in which reservation was made that, "independently of existing general or special treaties, imposing the obligation" to arbitrate, the Signatory Powers should have "the right to conclude" at any time "new agreements, general or special, with a view of extending the obligation" to arbitrate. The phrase "extending the obligation" relates to any "obligation" which might be subsisting under arbitration treaties that were at the time in force between the parties, not to any "obligation" to arbitrate imposed by The Hague Convention—because, unfortunately, there was none. All proposals to make arbitration in any way obligatory were turned down by the Conference.

The Hague Convention, therefore, omitted entirely the giving of any jurisdiction to the Tribunal it set up; it merely provided an arrangement for the arbitration of international disputes, and left each state free to decide whether in a given case it would invite, of if invited, would refuse the remedy of arbitration.

The "epidemic" of arbitration treaties which has followed The Hague Conference shows the same hesitancy on the part of nations to give to arbitration in any wise a certain and definite juris-

diction. Of the fifty-odd treaties which have been signed "with a view of extending the obligation" to arbitrate, only a few give a jurisdiction—only a few make arbitration obligatory. Under none of the others is it possible for one state to summon another to the Arbitral Court. Under none of the others is any definite question of international dispute unconditionally segregated for arbitration. Under each of the other treaties, the state has reserved for its own decision, whenever a question of difference shall arise, whether the particular question shall be arbitrated. If at such time, which would ordinarily be a time of more or less national excitement and feeling, the state should decide that it was compatible with its "vital interests," "national honor," "independence" or "constitution" to arbitrate, then it might extend an invitation, or accept an invitation, to arbitrate.

To sum up, the present situation in *law* as regards the necessity to arbitrate international disputes instead of resorting to force is in no wise different, with the minor exceptions mentioned, from what it was before The Hague Conference.

Question at the Next Hague Conference.—The question at the next Hague Conference should be, it would seem: Are the civilized states so much in favor of peace that they are willing to agree, in order to make a positive but slight start in this direction, to set apart for settlement by arbitration a portion, however small, of the matters which give rise to international disputes?

The giving of a definite and unconditional jurisdiction to arbitration would act as an entering wedge. Gradually, this jurisdiction might be extended, as the early writs in England extended the jurisdiction of the courts. Gradually, the states might be expected to discover that their "national honor" and "vital interests" are not jeopardized by referring their differences to the arbitrament of law. Gradually, states, and the society of which they are composed, might be expected to acquire the habit of submitting international disputes to the decision of international tribunals in which they have confidence. Gradually, the crude arbitration arrangements of the present would be perfected, and that confidence in the fairness and judicial attitude of the arbitrators which is fundamental to the reign of law would come to exist. Gradually, the attachment of the property of an alleged debtor, in advance of a judicial investigation into the merits of the debt—a procedure unknown to the English common law—would

cease as between the states. Gradually, states would consider that it is unbecoming the high dignity and standards of justice which they should maintain, to lend their great powers to the collection of the often falsely exaggerated claims of unprincipled speculators, supported by merely *ex parte* evidence.

To give to the Arbitration Tribunal a definite and unconditional jurisdiction, however small to begin with, would put it beyond the legal capacity of states to confound their "national honor," etc., in a time of necessarily keen public feeling, with what would, in an ordinarily calm state of the public mind, be considered a mere lawsuit.

If, then, the civilized public opinion of the world is so much in favor of peace that it is willing to venture a slight but positive step in the direction of the reign of law in the settlement of international differences, the question arises: What are the matters which are giving rise to international disputes that can, with safety to the "vital interests," "national honor," etc., of states be unconditionally segregated for this purpose?

A strong argument might be presented for the setting apart for peaceful settlement, at all times, of all disputes incident to the collection of public debts arising from money loaned by subjects to foreign states, or, at least, for deferring the right to use force till after the alleged debts have been judicially examined and the sum due ascertained. "The propositions" in the note of Dr. Drago of December, 1902, described by Mr. Hay as "ably set forth," incidentally mention some of the reasons why international arbitration tribunals might be given jurisdiction over disputes relative to the public debts due foreigners.

Several cogent arguments, it would seem, can be advanced for a jurisdiction of this subject, which are not applicable to other classes of international pecuniary claims. Thus: "The capitalist who lends his money to a foreign state always takes into account the resources of the country and the probability, greater or less, that the obligations contracted will be fulfilled without delay." He generally takes advantage of the necessities of the borrowing state, and exacts discounts and interest accordingly. He knows that he is loaning his money to a sovereignty which is accorded by law the right to give or withhold the usual remedies of civil suit. He is aware that all debts of a state exist subject to the state's being in position to pay them without embarrassment to

its existence; and that, in law, the state is the sole judge of its ability to pay at any particular time. He knows that modern conditions require states to expend vast sums of money for the development and maintenance of their various public works; that, in the long run, all states must uphold their credit; and that, to accomplish this, the debtor states must observe a decent husbandry and keep good faith in their obligations. He knows that the legal relation of the delinquent debtor to his creditors has some points of difference from the legal relation of a state to foreign subjects whose person and property, while within the jurisdiction of the state, are injured, and who are denied civilized justice; that in the transaction of buying the bonds of a foreign state he is accepting the promise of the state in return for his property; and that the loss of one's property through a breach of promise is not so direct an injury as a loss occasioned without a promise.

If the various foregoing considerations are sound, the Conference at Rio de Janeiro did well not to adopt the resolution originally formulated for its consideration which had for its object the requesting of the next Hague Conference to consider a rule of international law which it would seem impossible to question. What the Conference did do was formally "to recommend to the Governments represented therein that they consider the point of inviting the Second Peace Conference at The Hague to consider the question of the compulsory collection of public debts; and, in general, means tending to diminish between nations conflicts having an exclusively pecuniary origin." The resolution adopted by the Conference is very indefinite, but it is probably an improvement on the one formulated for its consideration.

It is generally expected that some American state, perhaps the United States, will "consider the point" and present "the question" to the next Hague Conference. It is to be hoped that the question will be formulated for the consideration and action of the Conference with due regard to international law, foreign politics and the practical object to be attained, and that, by a treaty to which all states are party, International Arbitration will be given an unreserved jurisdiction of a small portion of the matters which are giving rise to disputes between states.

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